

The Honorable Fred Van Sickle

STEVE W. BERMAN, WSBA No. 12536  
ERIN K. FLORY, WSBA No. 16631  
HAGENS BERMAN SOBOL SHAPIRO LLP  
1918 8<sup>th</sup> Avenue, Suite 3300  
Seattle, WA 98101  
(206) 623-7292

BRADLEY B. JONES, WSBA No. 17197  
KENNETH G. KIEFFER, WSBA No. 10850  
F. MIKE SHAFFER, WSBA No. 18669  
GORDON THOMAS HONEYWELL  
MALANCA PETERSON & DAHEIM LLP  
1201 Pacific Avenue, Suite 2100  
Tacoma, WA 98402  
(253) 620-6500

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON  
AT SPOKANE

In re METROPOLITAN SECURITIES  
LITIGATION

No. CV-04-0025-FVS

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

PLAINTIFFS' MEMORANDUM  
IN SUPPORT OF MOTION *IN*  
*LIMINE* TO CONFIRM "SUIT  
DATE" AS DECEMBER 17, 2004

Hearing Date: March 3, 2010  
Time: 9:00 a.m.

**I. INTRODUCTION**

In connection with the cross motions for summary judgment on negative causation, Plaintiffs argued that the correct "suit date" for the purposes of calculating damages against PwC in this case for assessing damages and loss-

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1 causation issues is December 17, 2004, the day claims were first filed against PwC.  
 2 The Court did not reach the issue in its ruling denying the parties' respective  
 3 motions for summary judgment. However, Plaintiffs believe the resolution of the  
 4 issue is important to resolve prior to trial, and therefore request that the Court rule  
 5 *in limine* that the "suit date" for the purpose of Plaintiffs' claims against PwC is  
 6 December 17, 2004.  
 7

## 8 II. ARGUMENT

### 9 A. Section 11 Measures Damages As of the Date Plaintiff Filed A Claim 10 Against a Defendant

11 Section 11 damages are the difference between the security's purchase price  
 12 and its value "as of the time such suit was brought ...." 15 U.S.C. § 77k(e). The  
 13 "time such suit was brought" refers to the date a suit authorized under subsection  
 14 11(a) was filed. For PwC, that date is December 17, 2004, the date that PwC was  
 15 first added as a defendant, (Ct. Rec. 150, attachments 1-13), in the Consolidated  
 16 Amended Complaint, not January 20, 2004, the date the first complaint in this case  
 17 was filed. The December 17, 2004 Complaint asserted the first § 11 claim against  
 18 PwC, *id.* at 109-13. This was the initial claim against PwC and does not relate  
 19 back to an earlier complaint.  
 20

21 PwC nonetheless made clear in prior filings (and at oral argument on  
 22 summary judgment) that it believes the proper suit date is January 20, 2004 –  
 23 *before* Plaintiffs named PwC as a defendant and before Plaintiffs had even alleged  
 24 a Section 11 claim against any party. To Plaintiffs' knowledge, no court has ever  
 25 found that the § 11 suit date as to a particular defendant was a date *before the*  
 26

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1 *defendant was added to the lawsuit and where the new complaint did not relate*  
2 *back to an earlier filing.*

3       Complex securities scams do not necessarily fully reveal themselves to the  
4 public at once. More typically, the scam is unveiled piecemeal via a series of  
5 public disclosures or by the materialization of previously concealed risks. Parties  
6 responsible for a false or misleading registration statement thus may be named as  
7 § 11 defendants at different times, in response to different disclosures or events.  
8 For example, if the first public disclosure of misstatements in a registration  
9 statement does not implicate the statement's financial reports, the § 11 plaintiff  
10 would not have grounds to name the issuer's auditor as a defendant in the initial  
11 § 11 claim. But if subsequent disclosures or events trigger additional losses by  
12 exposing errors in the financial reports, the plaintiff might extend the § 11 claim to  
13 the auditor.  
14

15  
16       PwC's position would immunize culpable auditors from § 11 liability in  
17 such a case and create a conflict between the securities law and the Federal Rules  
18 of Civil Procedure. If the initial complaint's filing date governed the calculation of  
19 § 11 damages as to all defendants, even for subsequent losses attributable to the  
20 acts of subsequently named defendants, those subsequently named defendants  
21 would evade liability even though their actions caused the loss in value. The law  
22 does not grant this sweeping immunity to securities violators.  
23

24       PwC's contrived reading of § 11 is contrary to the Security Act's remedial  
25 purpose of protecting public investors from serious abuses in the securities market,  
26

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1 *see, e.g., SEC v. W. J. Howey Co.*, 328 U.S. 293, 301 (1946) (Securities Act’s  
 2 “statutory policy” is “affording broad protection to investors”); *Reves v. Ernst &*  
 3 *Young*, 494 U.S. 56, 60 (1990). This remedial purpose will not allow interpretation  
 4 of § 11 in such a contrived manner as to grant PwC immunity simply because  
 5 different plaintiffs<sup>1</sup> filed different claims against different defendants on January  
 6 20, 2004.  
 7

8 PwC’s position also ignores the relevant relation-back principles. Only  
 9 under narrow, and inapplicable, circumstances of notice and mistake regarding the  
 10 identity of closely related parties do courts allow a claim to relate back to a prior  
 11 claim filed against a different defendant. *See, e.g., Nelson v. Adams USA*, 529 U.S.  
 12 460, 467 n.1, 471 (2000); *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986);  
 13 *Eaglesmith v. Ward*, 73 F.3d 857, 860 (9th Cir. 1995); *Kilkenny v. Arco Marine,*  
 14 *Inc.*, 800 F.2d 853, 857 (9th Cir. 1986). *See also Westport Ins. Corp. v. Markham*  
 15 *Group, Inc.*, 2009 U.S. Dist. LEXIS 76877, at \*15-16 n.4 (E.D. Wash. Aug. 26,  
 16 2009); *Bower v. Bunker Hill Co.*, 675 F. Supp. 1254, 1257 (E.D. Wash. 1986).  
 17 PwC suggests no grounds for the § 11 claims against them to relate back to  
 18 complaints that did not name them. And for good reason; if Plaintiffs’ claims  
 19  
 20  
 21  
 22

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23 <sup>1</sup> None of the three groups of plaintiffs that filed the initial complaint on  
 24 January 20, 2004, and the First Amended Complaint on January 30, 2004,  
 25 continued as named plaintiffs in the December 27, 2004 complaint.  
 26

1 related back to January 20, 2004, then PwC would face potential liability for  
2 millions of dollars in additional securities.

3 There is, accordingly, no basis to place the Securities Act and Rule 15(c) in  
4 conflict and extend immunity for § 11 violations to later-added defendants. Sound  
5 analysis and authority compel rejection of PwC's position.  
6

7 **B. The Cases Cited By PwC at Oral Argument are Inapposite**

8 At oral argument on January 5, 2010, PwC's counsel cited three authorities  
9 in response to Plaintiffs' argument regarding the correct "suit date" in this case. A  
10 review of PwC's authorities demonstrates that they do not effectively rebut  
11 Plaintiffs' analysis that relation-back principles indicate that while a § 11 claim can  
12 relate back to an earlier, similar claim against the same defendant, such a claim  
13 cannot relate back to a subsequently added defendant.  
14

15 In *Alpern v. UtiliCorp United*, 84 F.3d 1525, 1543 (8th Cir. 1996), the Court  
16 expressly relied on relation-back principles under Rule 15(c)(2) in finding that a  
17 later-filed § 11 claim related back to a § 10 claim because it "was based on the  
18 same transactions, occurrences, and conduct alleged in the original complaint."  
19 The decision contains no suggestion that the related-back § 11 claim applied to  
20 newly added defendants, or that amended complaints added new defendants at all.  
21 *Alpern* is consistent with Plaintiffs' argument.  
22

23 In *Beecher v. Able*, 435 F. Supp. 397, 402 (S.D.N.Y. 1975), the court chose  
24 as the suit date the date that the first of three consolidated § 11 claims was filed.  
25 The court explained that the entire class had been contemplated at the time the first  
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1 action was filed and that using that filing date could minimize date shopping in  
2 future cases, thereby limiting multiple identical suits. *Id.* Because of the  
3 circumstances of that case, which apparently did not include the addition of  
4 defendants in a later complaint, the court did not need to consider relation-back  
5 principles. The case is simply inapposite.  
6

7 *In re AFC Enters. Sec. Litig.*, 348 F. Supp. 2d 1363, 1379 (N.D. Ga. 2004)  
8 arguably supports defendants' position, in that the district court ruled that the suit  
9 date was the date of the initial complaint for all defendants, including later-added  
10 ones. The court purported to rely on *Alpern*, but apparently failed to consider  
11 whether the relation-back principles applied in *Alpern* were appropriate in the case  
12 of later-added defendants. By nominally applying but implicitly revising the  
13 relation-back rules in the context of § 11 standing, the court needlessly created a  
14 quagmire of conflicting law that this Court should not follow.  
15

16 In addition, Plaintiffs note that if PwC actually argues that the Complaint  
17 filed on December 17, 2004, should relate back to the Complaint filed on January  
18 20, 2004, then the tolling of the statute of limitations also should relate back to the  
19 original complaint. If that were the case, it would constitute a basis for reversing  
20 the Court's statute-of-limitations summary judgment Order dated February 8,  
21 2010. There is simply no logical or rule-based analysis that calls for entirely  
22 different approaches between relation back for tolling purposes and relation back  
23 for "suit date" purposes under § 11.  
24  
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**C. Plaintiffs' Prior Assumptions That the Suit Date Was January 20, 2004 Are Not Dispositive**

At oral argument regarding the motions for summary judgment, PwC contended that Plaintiffs should not be allowed to make arguments about a suit date other than January 20, 2004, because they did not previously dispute whether that was the correct suit date. Plaintiffs recognize they have filed briefs with the Court in which they stated that appropriate date was January 20, 2004, but that issue was not previously in dispute, and Plaintiffs only recently realized the issue, but even then Plaintiffs raised it four months prior to trial. There is no basis for any argument that Plaintiffs should be estopped from raising the issue.

**III. CONCLUSION**

For the reasons stated above, Plaintiffs request that the Court rule that the "suit date" for the purposes of this case is December 17, 2004.

Dated this 16th day of February, 2010.

HAGENS BERMAN SOBOL SHAPIRO LLP

By /s/ Tyler S. Weaver

Steve W. Berman, WSBA No. 12536

Erin K. Flory, WSBA No. 16631

Tyler S. Weaver, WSBA No. 29413

Jeniphr Breckenridge, WSBA No. 21410

1918 8th Avenue, Suite 3300

Seattle, WA 98101

Telephone: (206) 623-7292

Facsimile: (206) 623-0594

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1 F. Mike Shaffer, WSBA No. 18669  
2 Bradley B. Jones, WSBA No. 17197  
3 Kenneth G. Kieffer, WSBA No. 10850  
4 GORDON, THOMAS HONEYWELL,  
5 MALANCA, PETERSON & DAHEIM LLP  
6 1201 Pacific Avenue, Suite 2100  
7 Tacoma WA 98402  
8 Telephone: (253) 620-6500  
9 Facsimile: (253) 620-6565

10 *Co-Lead Counsel for Plaintiffs*

11  
12  
13  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party via email on February 16, 2010 to the following:

George S. Azadian [Azadian@strook.com](mailto:Azadian@strook.com)

James K Barbee at [jim@golbeckroth.com](mailto:jim@golbeckroth.com)

Philip S Beck at [anne.doyle@bartlit-beck.com](mailto:anne.doyle@bartlit-beck.com); [susan.dandrea@bartlit-beck.com](mailto:susan.dandrea@bartlit-beck.com)

Ronald L Berenstein at [rberenstein@perkinscoie.com](mailto:rberenstein@perkinscoie.com); [jstarr@perkinscoie.com](mailto:jstarr@perkinscoie.com)

Steve W Berman at [steve@hbsslaw.com](mailto:steve@hbsslaw.com); [heatherw@hbsslaw.com](mailto:heatherw@hbsslaw.com)

Brian D Buckley at [bbuckley@fenwick.com](mailto:bbuckley@fenwick.com)

Elizabeth J Cabraser at [ecabraser@lchb.com](mailto:ecabraser@lchb.com); [ewalser@lchb.com](mailto:ewalser@lchb.com)

Kelly P Corr at [kcorr@correronin.com](mailto:kcorr@correronin.com); [dpatterson@correronin.com](mailto:dpatterson@correronin.com); [reception@correronin.com](mailto:reception@correronin.com)

Pearl Del Rosario at [pdelrosario@orrick.com](mailto:pdelrosario@orrick.com); [valdeman@orrick.com](mailto:valdeman@orrick.com)

Christopher G Emch at [emchc@foster.com](mailto:emchc@foster.com); [pateb@foster.com](mailto:pateb@foster.com)

Timothy L Filer at [filet@foster.com](mailto:filet@foster.com); [howej@foster.com](mailto:howej@foster.com)

Steven Fogg at [sfogg@correronin.com](mailto:sfogg@correronin.com); [ivandiver@correronin.com](mailto:ivandiver@correronin.com)

E Joseph Giometti at [jgiometti@orrick.com](mailto:jgiometti@orrick.com); [gjohnson@orrick.com](mailto:gjohnson@orrick.com)

Peter Jennings Grabicki at [pjg@randanco.com](mailto:pjg@randanco.com); [scc@randanco.com](mailto:scc@randanco.com); [nlg@randanco.com](mailto:nlg@randanco.com)

Gary I Grenley at [ggrenley@grebb.com](mailto:ggrenley@grebb.com)

Richard M Heimann at [rheimann@lchb.com](mailto:rheimann@lchb.com); [lsimms@lchb.com](mailto:lsimms@lchb.com)

Kenneth P Herzinger at [kherzinger@orrick.com](mailto:kherzinger@orrick.com)

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1 David D Hoff at [dhoff@tousley.com](mailto:dhoff@tousley.com); [btaylor@tousley.com](mailto:btaylor@tousley.com)  
2 Tarek Ismail at [tarek.ismail@bartlit-beck.com](mailto:tarek.ismail@bartlit-beck.com); [anne.doyle@bartlit-beck.com](mailto:anne.doyle@bartlit-beck.com)  
3 Stephen M Knaster at [sknaster@orrick.com](mailto:sknaster@orrick.com); [vadelman@orrick.com](mailto:vadelman@orrick.com)  
4 James B. King at [jking@ecl-law.com](mailto:jking@ecl-law.com)  
5 Christopher D Landgraff at [chris.landgraff@barlit-beck.com](mailto:chris.landgraff@barlit-beck.com)  
6 Mary D Manesis at [mmanesis@stroock.com](mailto:mmanesis@stroock.com); [cdusi@stroock.com](mailto:cdusi@stroock.com)  
7 J Scott McBride at [scott.mcbride@barlit-beck.com](mailto:scott.mcbride@barlit-beck.com)  
8 James P McNeill, III at [mcnej@foster.com](mailto:mcnej@foster.com)  
9 Michael L Merriman at [michael.merriman@barlit-beck.com](mailto:michael.merriman@barlit-beck.com)  
10 Jeffrey S Miller at [milje@foster.com](mailto:milje@foster.com); [kellie@foster.com](mailto:kellie@foster.com); [snydd@foster.com](mailto:snydd@foster.com);  
11 [hickc@foster.com](mailto:hickc@foster.com)  
12 John Degnan Munding at [munding@crumb-munding.com](mailto:munding@crumb-munding.com); [brittany@crumb-munding.com](mailto:brittany@crumb-munding.com)  
13 Robert J Nelson at [rnelson@lchb.com](mailto:rnelson@lchb.com)  
14 Kevin Daniel O'Rourke at [korourke@southwellorourke.com](mailto:korourke@southwellorourke.com)  
15 Carl J Oreskovich at [carl@ettermcmahon.com](mailto:carl@ettermcmahon.com); [roni@ettermcmahon.com](mailto:roni@ettermcmahon.com)  
16 Erin K. Flory at [erin@hbsslaw.com](mailto:erin@hbsslaw.com); [carrie@hbsslaw.com](mailto:carrie@hbsslaw.com)  
17 Andrew K Polovin at [andrew.polovin@bartlit-beck.com](mailto:andrew.polovin@bartlit-beck.com);  
18 [anne.doyle@bartlit-beck.com](mailto:anne.doyle@bartlit-beck.com)  
19 Terry J Price at [tprice@rmalw.com](mailto:tprice@rmalw.com)  
20 Mark Roth at [mark@golbeckroth.com](mailto:mark@golbeckroth.com)  
21 Stephen M Rummage at [steverummage@dwt.com](mailto:steverummage@dwt.com); [jeannecadley@dwt.com](mailto:jeannecadley@dwt.com)  
22 Darrell W Scott at [scottgroup@mac.com](mailto:scottgroup@mac.com); [ssimatos@mac.com](mailto:ssimatos@mac.com)  
23  
24  
25  
26

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1 M Todd Scott at [tscott@orrick.com](mailto:tscott@orrick.com); [jwatts@orrick.com](mailto:jwatts@orrick.com); [tmanolova@orrick.com](mailto:tmanolova@orrick.com)

2 James M Shaker at [shaker@ryanlaw.com](mailto:shaker@ryanlaw.com); [callahan@ryanlaw.com](mailto:callahan@ryanlaw.com)

3 Daniel F Shea at [dfshea@hhlaw.com](mailto:dfshea@hhlaw.com);

4 Kim D Stephens at [kstephens@tousley.com](mailto:kstephens@tousley.com); [efile@tousley.com](mailto:efile@tousley.com);  
5 [jalbertson@tousley.com](mailto:jalbertson@tousley.com)

6 Julia B Strickland at [jstrickland@stroock.com](mailto:jstrickland@stroock.com); [tmitchell@stroock.com](mailto:tmitchell@stroock.com);  
7 [lacalendar@stroock.com](mailto:lacalendar@stroock.com)

8 Earl M Sutherland at [esutherland@rmlaw.com](mailto:esutherland@rmlaw.com); [lfisher@rmlaw.com](mailto:lfisher@rmlaw.com)

9 Beth E Terrell at [bterrell@tousley.com](mailto:bterrell@tousley.com); [bkinsey@tousley.com](mailto:bkinsey@tousley.com); [efile@tousley.com](mailto:efile@tousley.com)

10 Paul H Trincherro at [ptrincherro@grebb.com](mailto:ptrincherro@grebb.com)

11 Michael C Tu at [mtu@orrick.com](mailto:mtu@orrick.com); [sspencer@orrick.com](mailto:sspencer@orrick.com)

12 Robert P Varian at [rvarian@orrick.com](mailto:rvarian@orrick.com)

13 Fabrice Vincent at [fvincent@lchb.com](mailto:fvincent@lchb.com); [dclevenger@lchb.com](mailto:dclevenger@lchb.com)

14 Joshua Watts at [jwatts@orrick.com](mailto:jwatts@orrick.com); [gjohnson@orrick.com](mailto:gjohnson@orrick.com)

15 Christine Marie Weaver at [cw@cweaverlaw.com](mailto:cw@cweaverlaw.com)

16 Leslie Richard Weatherhead at [lwlibertas@aol.com](mailto:lwlibertas@aol.com)

17 Charles S Wright at [charleswright@dwt.com](mailto:charleswright@dwt.com); [terriray@dwt.com](mailto:terriray@dwt.com)

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19  
20  
21  
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HAGENS BERMAN SOBOL SHAPIRO LLP

By s/ Tyler S. Weaver

Tyler S. Weaver, WSBA No. 29413

1918 8th Avenue, Suite 3300

Seattle, WA 98101

Telephone: (206) 623-7292

Facsimile: (206) 623-0594

*Co-Lead Counsel for Plaintiffs*

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